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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 303

GEORGE NEFF,
Petitioner and Appellant below,

vs.

STATE OF KANSAS,
Respondent and Appellee below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS AND BRIEF IN SUPPORT THEREOF.

HAROLD W. GOODWIN,
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Wellington, Kansas;
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INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of Kansas	1
I. Summary Statement of the Matters Involved	
Statutes Cited:	
G. S. Kan. 1935:	
Sec. 43-101	2
Sec. 43-102	3
Sec. 43-103	4
Sec. 43-104	4
Sec. 43-105	5
Sec. 43-106	5
Sec. 43-107	5
Sec. 43-116	6
Sec. 43-117	6
Sec. 43-120	6
Sec. 43-121	6
Sec. 43-128	7
Sec. 43-129	7, 36
Sec. 43-130	8
Sec. 75-1411	8
Brief in Support of Petition for Writ of Certiorari	22
I. Opinion Below	22
II. Jurisdiction	22
III. Statement of the Case	23
IV. Specifications of Error	23
V. Argument	23
Authorities:	
Akins v. *State of Texas*, 325 U. S. 398, 65 S. Ct. 1276	26
50 C.J.S. p. 892, Sec. 164	27
Classen v. *United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680	30, 32
Fay v. *New York*, 332 U. S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043	32, 33

190229

Page

Frazier v. *United States*, 335 U. S. 497, 69 S. Ct. 201 32
Hartshorne's Lessee v. *Patton*, 2 U. S. 249, 2 Dall. 252, 1 L. Ed. 309 28
Hill v. *State of Texas*, 316 U. S. 400, 62 S. Ct. 1159 27
Hodgson v. *State*, 168 U. S. 262, 42 L. Ed. 461, 18 S. Ct. 80 24
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1075, 55 S. Ct. 579 24
Sioux City & Pac. R. R. Co. v. *Stout*, 84 U. S. 745, S. C. 17 Wall. 657 29
State v. *Edwards*, 64 Kan. 455 37
State v. *Jenkins*, 32 Kan. 477 37
Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664 26
Thiel v. *Southern Pac. R. Co.*, 328 U. S. 217, 66 S. Ct. 984 ..... 29, 31
Walter v. *State*, 208 Ind. 231, 195 N. E. 268, 98 A.L.R. 607 30

VI. Conclusion 37

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 303

GEORGE NEFF,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and to the Associate Justices of the Supreme Court of the United States:

George Neff, prays that a writ of certiorari to review the judgment of the Supreme Court of Kansas, a court of last resort, and the highest court of the state in which a decision could be had, entered on the 6th day of May, 1950, in which case petition for rehearing, duly filed, was denied and judg-

ment became final on the 16th day of June, 1950, be granted and respectfully shows to this Honorable Court:

I

Summary Statement of the Matters Involved

The case is reported in *State* v. *Neff*, 169 Kan. 116 and 218 Pac. (2nd) 248.

The appellant, George Neff, was arrested on the 10th day of January, 1948, charged in two counts, with murder.

In one count he was charged with the murder on the 16th day of December, 1947, of Kenneth Wynn, by shooting him with a rifle.

In the other count, he was charged with the murder of his wife, by poison, culminating in her death on November 17, 1947.

Two trials resulted in hung juries.

The third trial, which resulted in this petition, was held on April 18, 1949 to May 7, 1949, during the January 1949 term of the Court.

The jury found defendant guilty on the first count of the information, that of murdering Kenneth Wynn, but was unable to agree on the second count, that of poisoning his wife.

The jury fixed his punishment at "confinement and hard labor in the penitentiary of the State of Kansas for life" (Appellant's Abstract pp. 220-221).

Motion for a new trial was overruled and by appropriate proceeding, an appeal was taken to the Supreme Court of Kansas, where the judgment of the trial court was affirmed.

Among the grounds upon which George Neff appealed, and which he had urged from the beginning in the trial court, and later in the Supreme Court, was that he was denied due process of law and the equal protection of the law, as pro-

vided by the Sixth and Fourteenth Amendments of the Federal Constitution, in that in the panel from which the jury which tried him was selected, women, legally qualified and eligible for jury service, and willing to serve, were intentionally and deliberately excluded; that by reason thereof in the selection of the jury to try defendant, women who were legally qualified and eligible as jurors and willing to serve, were intentionally and deliberately excluded from the jury.

The claim of appellant is that he was not "given a lawfully selected panel, free from any taint of unlawful exclusion or procedure in selection" of the jury.

The claim included not only the unlawful exclusion of women from the panel, but the unlawful procedure by which the panel was selected.

The manner and procedure by which the list of those qualified and eligible for jury service, and from which the panel, from which the jury which tried defendant was selected, is more fully disclosed by the proceedings at each trial, all of which was before the Supreme Court of Kansas.

By Constitution and Statutes of Kansas, in force since 1913, women are eligible and qualified for service as jurors, the same as men, except that a woman may, without any other reason than her own desire, elect not to serve as a juror.

For the convenience of the Court, we set forth herein certain pertinent provisions of the Statutes of Kansas, relating to selection of jurors.

Some of the provisions of the General Statutes of Kansas 1935, were amended by the Legislature in 1947, effective June 30, 1947.

We are, therefore, quoting the sections as they were in force and effect at all times material to this case.

"*Section 43-101. Listing persons for jury service.* The trustee of each organized township, and the mayor

of any city not included in any corporate limits of any township, shall at his office during the month of April of each year make a list of persons to serve as jurors for the ensuing year, as hereinafter provided."

(G. S. 1935.)

"*Section 43-102. Selection; qualifications; number to be selected.* They shall select from those assessed on the assessment roll of the preceding year suitable persons having the qualifications of electors, and in making such selection they shall choose only those who are not exempt from serving on juries, and who are possessed of fair character and approved integrity, and in possession of their natural faculties, and not infirm or decrepit, and who are well informed and free from legal exceptions; *Provided,* That no person shall be selected as a juror who either in person or by any other means shall solicit his selection as such; and the trustee of each township and the mayor of each city shall each select at least one such person for each fifty inhabitants therein."

(G. S. 1935.)

"*Section 43-103. Jurors of preceding year not selected; challenge for cause by reason of; lists certified by county clerk.* In making such selections, each person who shall have served as a juror in any capacity at any term of court during the year next preceding such selection shall be excluded from the list of jurors for the then ensuing year; and if any such person shall be selected or drawn, it shall be the duty of the court to which such jurors shall be summoned to strike the names of such persons from the list of jurors; and it shall be good cause of challenge to any juror that such juror shall have served as a juror in any court of record during the year next preceding such selection; and no juror called or summoned, who shall have so served during such preceding year, shall draw any pay for more than one day during the term of court to which he shall be so summoned; and a list of the persons so selected shall be, immediately after such selection, certi-

fied by the officers making such selection to the county clerk of such county."

(G. S. 1935.)

"*Section 43-104. County clerk to file such lists; names to be prepared and placed in 'jury box.'* On receiving such lists the county clerk shall file the same in his office, and shall write down the names contained therein on separate pieces of paper, of the same size and appearance, as nearly as may be, and shall fold up each of such pieces of paper so as to conceal the name thereon, and deposit them in a box to be kept by him for that purpose, to be labeled 'jury box.' "

(G. S. 1935.)

"*Section 43-105. Persons so selected to serve one year.* The persons whose names shall be so returned shall serve as such jurors for one year, and until other persons are selected and lists of such persons returned and filed."

(G. S. 1935.)

"*Section 43-106. Papers in jury box to be destroyed and new names entered on receipt of new lists.* Upon the receipt of such certificates of selection of jurors such county clerk shall destroy the papers in the jury box containing the names of jurors heretofore selected, and file such new lists and place in the jury box the names of the jurors so drawn, as provided in section six (46-123) of this act."

(G. S. 1935.)

"*Section 43-107. Drawing of grand and petit jurors.* At least thirty days before any term of the court at which a petit jury shall be required by law, or a grand jury ordered by the court, the clerk of the county where such court is to be held shall draw from the jury box the names of fifteen persons to serve as grand jurors and the names of twenty-four persons to serve as petit jurors."

(G. S. Suppl. 1947.)

"*Section 43-116. Exemption from jury service.* The following persons shall be exempt from serving as jurors, to-wit: All persons holding office under the laws of the United States or this state, attorneys and counselors at law, women, physicians, all registered pharmacists and assistant pharmacists, ministers of the gospel, professors and teachers of colleges and other institutions of learning, ferrymen, all members of any company of firemen organized according to law, all persons more than sixty-five years of age: *Provided, however,* That this act shall not exempt from jury service township officers and officers of district schools."

(G. S. 1935.)

"*Section 43-117. Same; Women exempt, when.* That it shall be the duty of each township and city assessor, at the time of making the annual assessment of personal property, to inquire of each woman elector within his township or assessing district, whether she desires to be exempt from jury service for the ensuing year, and if she answers that she does desire to be so exempted from such jury service, her name shall not thereafter be placed in the list of persons to serve as jurors, nor otherwise selected for such purpose, but if she answers that she does not desire to be so exempted her name shall be reported by the assessor in making his regular report and the names of such suitable persons not wishing such exemption shall be placed in the lists as other qualified jurors are placed."

(G. S. 1935.)

"*Section 43-120. Order for additional number of jurors.* That whenever in the opinion of the judge of any district court, more than twenty-four petit jurors shall be necessary to attend any such district court, he may, by an order under his hand, direct such additional number of jurors to be drawn as he may deem necessary."

(G. S. Suppl. 1947.)

"*Section 43-121. Same; filing of order and drawing of jurors.* Such order shall be served on and filed with

the clerk of the county in which such court is to be held, at least thirty days previous to the day appointed for the commencement thereof, and the said clerk shall thereupon draw the number specified in such order in addition to the number otherwise required by law, and shall proceed therein in all respects in the same manner herein prescribed."

(G. S. 1935.)

"*Section 43-128. Court to select jurors and cause venire to issue where officers have failed to perform duty.* That whenever it shall be made to appear to the court that the township trustees and mayors of cities, as provided for in the act (*) to which this is an amendment, have failed to make the lists from the assessment rolls of the previous year, or that from any other cause the lists furnished by them to the county clerk or the names taken therefrom and deposited in the jury box have been so returned or deposited as to vitiate a panel draw therefrom, it shall be the duty of the judge of such court to forthwith select a sufficient number of jurors for the term, and cause a venire to issue for the same, naming the jurors so selected therein.

* "Provided for the in the act, see Secs. 43-101 to 43-103, 43-106, 43-123 and 43-127."

(G. S. 1935.)

"*Section 43-129. Order for new list when lists irregular.* That whenever it shall be made to appear to the court that from any cause the lists made out by the township trustees and mayors of cities and deposited with the county clerk, and the names taken therefrom and deposited in the jury box, have been so made out and returned or so deposited as to vitiate the panel, it shall be the duty of the judge of such court to issue his order to said trustees and mayors of cities to meet at the office of the county clerk on a day in said order named, and then and there to make out a list of persons to serve as jurors for the balance of the ensu-

ing year, as in said act (*) to which this is an amendment provided.

* "Said act, see citations under Sec. 43-128."

(G. S. 1935.)

"*Section 43-130. Same; duty of clerk.* That upon the completion and certification of said lists by said township trustees and mayors of cities, they shall be delivered to the county clerk, who shall file the same in his office and proceed to write down the names contained in such lists in the same manner as though such lists had been certified to and deposited with him at the time fixed by law."

(G. S. 1935.)

The use of the word "trustee" and the word "assessor" might lead to some confusion, but by Section 75-1411 G. S. Kansas 1935, the township trustees are made the assessors for the township.

The list thus made up by the assessors of the several townships and the mayors of the cities in the county, constitute the list of eligible and qualified jurors from which the panel of jurors for service during each year, are drawn.

Briefly described, in the month of April of each year, the trustees in each township and the mayors in each city were required to make a list of persons to serve as jurors for the ensuing year. They were to select at least one person for each fifty (50) inhabitants.

Their qualifications were:

(a) They must be electors
(b) not exempt from jury service
(c) possessed fair character and approved integrity
(d) possessed of their natural faculties
(e) not infirm or decrepit
(f) well informed
(g) free from legal exceptions
(h) had not in person or by other means solicited his selection as such

(i) had not been a juror in a court of record during the preceding year.

The township and city assessors were required, in making the annual assessment, to inquire of each woman elector, whether she desired to be exempt from jury service, and if she did not so desire, her name "shall be placed in the list as other qualified jurors are placed." This list so compiled was filed with the county clerk.

It was the duty of the county clerk to place each name on this list so returned, on a separate slip of paper, and these separate slips were placed in the jury box. From this jury box the panel of required jurors for the ensuing year was drawn (Sec. 43-104 Supra).

From the list so prepared by the assessors and mayors a panel was drawn for the trial of defendant in May 1948.

Defendant, petitioner, in proper time filed his motion to quash the panel, on the ground that a group or class of legally qualified and eligible jurors willing to serve (women) had been purposely and intentionally excluded from the list so prepared by the assessors and mayors (Appellant's Abstract P. 9).

An extensive hearing was had, showing beyond dispute that the assessors, and mayors alike, had purposely and intentionally excluded women from the lists so prepared by them, and that there were eligible, qualified women willing to serve as jurors, who would not claim their exemption.

The Judge of the District Court who sat in the trial of this case, and at that time stated into the record, that he had prepared written instructions to the township assessors and mayors in the cities in Sumner County, Kansas, "relative to their duties in making up jury lists." He stated that "the section of the law relating to inquiries of the women in regard to their exemption, was not included in the written instructions by this court. Furthermore, in appearing

before the township assessors this court suggested to the assessors that because they have no court house, because of the inadequacy of our accommodations, the fact that women themselves could not be forced to serve by reason of being exempt, it was suggested that the *law need not be applied*" (Appellant's Abstract, 14) (Emphasis supplied).

In the Court's written instructions to the assessors, he said:

> "(8) Who Are Exempt From Jury Service? (a) All persons holding office under the laws of the United States; (b) All persons holding office under the laws of the State of Kansas; (Note: Township officers and officers of school districts are *not* exempt); (c) Attorneys at law; (d) *Women;* (e) Physicians; (f) Registered pharmacists and assistant pharmacists; (g) Ministers of the Gospel; (h) Funeral Directors and Embalmers; (i) Ferrymen; (j) Firemen; (k) Professors and teachers; (l) All persons more than 65 years of age" (Emphasis supplied) (Appellant's Abstract 235).

In addition to that, a large number of township assessors were placed on the witness stand at this May 1948 trial, and testified that they had never inquired of women whether they were willing to serve as jurors or not, as required by Section 43-117 above, and that these assessors had never placed the name of any woman on the list (Appellant's Abstract 13-37).

In fact, the evidence was so conclusive, that the counsel for the State stated:

> "We claim we have confessed the motion to quash, and we are both claiming the list should be vitiated" (Appellant's Abstract, 21).

On the ground of inadequate facilities to accommodate a jury composed of men and women, the Court said:

> "The Court will take judicial notice of the fact he has never locked up a jury over night for nineteen years" (Appellant's Abstract, 33).

The Court then quashed the panel, saying:

> "It appears there is quite an irregularity in the compliance with our laws in connection with the preparation of the jury lists. Many times, of course, there might be errors that are rather immaterial; but, it seems to this Court that the law hasn't been complied with strictly, and it will be the order of the Court that the panel of jurors be quashed. The motion is not sustained in its entirety, but the Court does find that the panel of jurors has not been listed in harmony with the law, and the panel should be quashed" (Appellant's Abstract, 35-36).

He then selected the very same panel to try the defendant, as indicated by the record:

> "Mr. Goodwin: May the record show that after the presentation of the motion to quash the jury panel the Court dictated an order in which he found that the panel was not drawn according to law and ordered the panel quashed, and that the Court then stated he would proceed under 43-128, Revised Statutes of 1935, and immediately read from the bar docket the names of the same panel of jurors originally drawn and which had just been quashed by the order of the Court, with the exception of those jurors who were excused this morning upon the process of giving excuses for not serving upon the panel. That is a correct statement, is it not?
>
> "Court: It is a correct statement. The motion is overruled. Now, anything further?" (Appellant's Abstract, 36-37).

This is made more clear by the Journal Entry of judgment reading:

> "It Is, Therefore, by the Court, Considered, Ordered, Adjudged and Decreed, That the panel of jurors drawn for the May, 1948, term of Court, be, and it is hereby, declared to be vitiated by reason of irregularities in compiling the lists furnished to the County Clerk, and by reason thereof, said jury panel is hereby quashed.
>
> "And Now, It appearing that the above entitled case is set for trial upon this date and at this hour, and the Court having no jurors available to try said case, it is the duty of the Court to forthwith select a sufficient number of jurors for the May, 1948, term, pursuant to Section 43-128 of the General Statutes of Kansas for 1935.
>
> "It Is, Therefore, Considered, Ordered, Adjudged and Decreed, by the Judge of said Court, that the following named electors of Sumner County, Kansas, be and they are hereby appointed to serve as jurors for the May, 1948, term, pursuant to the provisions of G. S. 43-128, to-wit:
>
> (The Court thereupon named the same veniremen as previously summoned)" (Appellant's Abstract, 49-50).

Over defendant's, petitioner's, objection, he was tried by a jury selected from this panel, which resulted in a hung jury.

These proceedings are material because substantially the same proceedings were followed in each of the two succeeding trials, from the last of which this petition is filed.

The September panel of jurors was drawn from the list in the jury box, which had been compiled in the same manner as the list at the prior term and which the Court had already held was irregularly compiled, and the panel drawn therefrom already vitiated.

The defendant, petitioner, thereupon filed his motion to quash this panel, on substantially the same grounds as his former motion.

On the hearing of this motion, it was stipulated that:

"1. That the former record made at the hearing to quash the jury panel drawn for the May term, 1948, of this Court shall be considered by the Court, insofar as it may be pertinent, with the same force and effect as though the same evidence were offered at this hearing.

"2. That the township assessors of all of the townships, and the assessing officers of the cities of Sumner County, Kansas, have failed and neglected, for approximately the last twenty years, to inquire of each woman elector within his township, assessment district, or city, whether or not she desired to be exempted from jury service for the ensuing year. That if defense counsel caused certain women electors in Sumner County, selected by them, to be subpoenaed, and presented their testimony to the Court, some of said women electors would testify that if the trustees, mayors, and assessing officers had inquired of them in the years 1945, 1946, and 1947, if they desired to be exempted from jury service, some of said women electors who are qualified to serve as jurors in Caldwell and Wellington cities, and in some of the townships of Sumner County, would have answered that they did not desire to be exempted from jury service.

"3. That no women electors of Sumner County were named on the lists from which the names were procured and placed in the 'jury box', and from which this jury panel was drawn. That the name of no woman elector of Sumner County appears upon the panel of jurors drawn for service in the September, 1948, term of this Court.

"4. That the parties hereto are unable to stipulate and evidence will be offered by the defendant in connection with the question as to the source of the jury list,

from which was selected the panel for the September, 1948, term of this Court" (Appellant's Abstract, 57-58).

Evidence was introduced to support the motion.

On the 25th day of October, 1948, this motion was sustained and the panel quashed, the Court finding and determining that:

> "The Court being well and truly advised of all the facts in the premises, finds that there are irregularities in the selection of the panel of jurors, for the September, 1948, term and that said jury panel has been vitiated and should be quashed.
>
> "It is therefore, by the Court considered, ordered, adjudged and decreed, that the panel of jurors drawn for the September, 1948, term of Court, be and it is hereby declared to be vitiated by reason of irregularities therein and that by reason thereof said jury panel is hereby quashed." (Appellant's Abstract, 54-55).

The Court thereupon selected as a panel from which a jury was to be selected the very same panel which he had just quashed as an invalid panel, drawn from a list which had not been prepared as provided by law and was invalid, all as shown by the Record, as follows:

> "Mr. Goodwin: *May it please the Court: May the record show that the list of jurors which the Court has just named by Order of the Court are the same jurors that were drawn for this term, with the exception of those who have heretofore been excused. That is a correct statement, is it not?*
>
> "Court: Yes; it is so ordered." (Appellant's Abstract, p. 61.)
>
> This second trial resulted in a hung jury.

Thereafter the Court, on the first day of December, 1948, issued its order for the drawing of a panel from this same jury box, for the January 1949 term of the Court, in which

were deposited the list of names which the Court had theretofore held to be unlawfully taken, and the panel selected therefrom invalid and vitiated, stating in the order:

> "It Is Therefore Ordered that there shall be drawn from the jury box of said county, the names of 26 petit jurors in addition to the twenty-four required by law to be drawn for such term and that all of said 50 jurors shall be served in the manner required by law to appear before said Court on the 10th day of January, 1949, at the hour of 9:30 o'clock a.m." (Appellant's Abstract, p. 62.)

The defendant, petitioner, thereupon filed his motion requesting the Court to select a panel as provided by Section 43-129, G. S.. 1935, *supra,* stating:

> "The defendant further moves that the court proceed forthwith, under Section 43-129, 1935 Revised Statutes of Kansas, to issue his order to the trustees of the townships of Sumner County and to the mayors of the cities of Sumner County, to meet in the office of the county clerk on a day to be fixed by the court and, then and there, to make out a list of suitable persons, consisting of both men and women to serve as jurors for the balance of the ensuing year, including the January, 1949, term of this court, and that such names be placed in the 'jury box' and that a panel of jurors to serve in the January, 1949, term of this court, and in the trial of this cause during said term, be drawn from such new lists of persons to serve as jurors." (Appellant's Abstract, p. 65.)

On the hearing of this motion counsel for defendant, petitioner, stated:

> "Mr. Goodwin: This motion calls the Court's attention to the fact that the jury panel for this term, January, 1949, Term, is drawn from the same list of names

in the jury box as was the panel for the September, 1948, Term of court. It also calls the Court's attention to the fact that a motion to quash the panel for the September, 1948 Term of court was filed and presented to the Court, and that the Court sustained the motion to quash the panel." (Appellant's Abstract, p. 66-67.)

The trial court on the hearing of this motion considered all prior proceedings in the matter of preparing the lists of eligible and qualified jurors, saying:

> "Court: This Court realizes that, from former proof, those charged with making up the jury lists failed in complying with the law—therefore, your motion should be sustained. The panel is not a legal panel. Now, you ask to apply Section 43-129—I don't see how 129 can be applied." (Appellant's Abstract, p. 69.)

The Journal Entry of Judgment so states, as follows:

> "The defendant offered in support of his motion the stipulation and evidence heretofore offered in this case in support of a similar motion at the September, 1948, term of this court." (Appellant's Abstract, p. 73.)

The Court then quashed the panel, saying:

> "Court: In connection with the defendant's motion in case No. 2406, the Court finds that by reason of no compliance with Section 43-117 of the General Statutes of Kansas of 1935 that defendant's motion for an order determining that the panel of jurors drawn to serve in the January, 1949, Term be quashed, should be sustained. The Court further finds that by reason of the failure to comply with said Section 43-117, it is the duty of this Court to proceed pursuant to Section 43-128 and make selection of a sufficient number of jurors to serve during the Term, and it is so ordered." (Appellant's Abstract, p. 71.)

Having quashed the panel, the Court, thereafter and on January 20, 1949, made and entered the following order:

> "It Is, Therefore, by the Court, Duly Considered, Ordered and Adjudged that pursuant to Section 43-128 of the General Statutes of Kansas of 1935, the following named persons, possessing the qualifications of jurors, and resident in Sumner County, Kansas, be and they are hereby selected as veniremen for service as regular jurors at the January, 1949, term of said court, to-wit:
>
> "(The Court then listed same veniremen as previously drawn and summoned.") (Appellant's Abstract, p. 74.)

That is, having quashed the panel as invalid, he named the same panel.

Thereafter on the 21st day of January, 1949, the Court made and entered an order for 175 additional jurors to be "drawn from the jury box provided for the drawing of a regular panel of jurors in the office of the County Clerk of Sumner County, Kansas, and that the drawing of said names shall be made by the County Clerk of said county in the presence of the Sheriff, the Clerk of the District Court, and the Register of Deeds of said County at the hour of 2:00 o'clock p.m. on the 24th day of January, A.D. 1949, or as soon thereafter as said County Clerk can get said officers together, and a list made of the names of the persons so drawn from said jury box and submitted to the Judge of this Court for final selection as veniremen." (Appellant's Abstract, p. 75-76.)

Thereafter the Court on January 25, 1949, approved the panel so drawn from the jury box, in his order as follows:

> "It Is, Therefore, by the Court Duly Considered, Ordered and Adjudged that the following named persons be and they are hereby selected as veniremen for

service as jurors at the January Term of said court, to-wit:

"(The Court then listed the names drawn in pursuance of order dated 21 Jan., 1949.)" (Appellant's Abstract, p. 77.)

Following this in the course of the third trial and on April 21, 1949, the Court made and entered an order for 175 additional jurors to be drawn and selected as follows:

"It Is, By the Court, Duly Considered, Ordered and Adjudged That the names of 175 persons shall be drawn from the jury box provided for the drawing of a regular panel of jurors in the office of the County Clerk of Sumner County, Kansas, and that the drawing of said names shall be made by the County Clerk of said county in the presence of the Sheriff, the Clerk of the District Court, and the Register of Deeds of said County at the hour of 9:30 a.m. on the 22nd day of April, A.D. 1949, or as soon thereafter as said County Clerk can get said officers together, and a list of the names of the persons so drawn from said jury box made and submitted to the Judge of this court for final selection as veniremen." (Appellant's Abstract, p. 79.)

There were not enough names on the list in the jury box to supply this additional panel, and therefore the Court, on April 22, 1949, made and entered the following order:

"It Is by the Court Duly Considered, Ordered and Adjudged, in order to execute the order heretofore made by this Court, that as an aid to this Court in making the selection of qualified veniremen, the County Clerk, Register of Deeds, Sheriff, and Clerk of the District Court of Sumner County, Kansas, be and they are hereby appointed and directed to list from the tax rolls of Sumner County, Kansas, the names of 138 persons possessing the qualifications of jurors and submit the same to the Judge of this Court for final approval and selection in order that the business of the court may be conducted and disposed of with the proper

dispatch, and that said officers proceed forthwith to execute this order as herein directed, all in harmony with the purport of the order of this Court made April 21, 1949." (Appellant's Abstract, p. 81.)

The Court then approved the panel, thus drawn from the jury box, supplemented by the names of those selected by the County Clerk, Register of Deeds, Sheriff and Clerk of the District Court, in the following order:

"It Is, Therefore, by the Court Duly Considered, Ordered and Adjudged that the following named persons be and they are hereby selected as veniremen for service as jurors at the January, 1949, Term of said Court, to-wit:

"(The Court then listed 37 names drawn from the jury box and 138 names selected by Sheriff, County Clerk, Register of Deeds and Clerk of the District Court of Sumner County.)" (Appellant's Abstract, p. 82.)

Immediately thereafter and on April 25, 1949, defendant, petitioner filed his motion to quash said panel so selected. He called the court's attention to the prior proceedings which resulted in quashing such panel, because the county assessors and mayors had not complied with statutory directions in preparing the list of qualified and eligible jurors, which they filed with the County Clerk, in that the names of women eligible and qualified for jury service and willing to serve as such jurors had intentionally and purposely been excluded from all of said lists which deprived the defendant of his constitutional right of due process of law and the equal protection of the law; That the third trial started on the 18th day of April, 1949, and up to and including April 21, 1949, a jury had not been obtained, and the entire panel theretofore drawn was exhausted; that under the order of the Court made and entered on April 21, 1949, 39 names had been drawn from the jury box, containing the invalid list of names for jury service, and that the Court had ordered additional jurors to be drawn from

the assessment rolls, "except Downs Township where the defendant resides, and choose sufficient additional names to make a list of 175 names in all." (Appellant's Abstract, p. 86.)

That the Sheriff, who was to assist in this selection, had sat with the County Attorney, advising and consulting with him in the examination and selection of jurors in the case, was designated by the Judge to be one of the four persons to select the additional jurors for the panel; That the Sheriff had been engaged in discovering and assembling evidence against the defendant, and was biased and prejudiced against the defendant, and so acted in selecting the jurors for the panel; and that the panel was irregularly and unlawfully drawn. (Appellant's Abstract, p. 84-88.)

The order for the additional jurors for the panel was made without notice to defendant or his counsel, and they had no opportunity to be present when the jurors were selected from the assessment rolls. (Appellant's Abstract, p. 89, 90 and 91.)

Evidence was introduced that during the drawing from the assessment rolls, the Sheriff "commented on the names read by me" (Mr. Aker, County Clerk), "from the assessment rolls. Some he said had been called on the other cases. Someone he thought wasn't eligible. He said he didn't think that was the right man for a juror." He "made comments on names eligible under the order of the Court, but I can't recall what comments I heard him make" (Appellant's Abstract, 91 and 92.)

The motion to quash was overruled. (Appellant's Abstract, p. 94.)

No woman's name was on any list compiled by assessors or mayors, or in the jury box, or drawn on any panel, and although the trial judge stated into the record, that:

> "The Court will take judicial notice that women are as smart as men, and all other qualifications being equal they are qualified to be jurors." (Appellant's Abstract, p. 22.)

Yet, when additional jurors were selected from the assessment rolls, with the assistance of the Sheriff, not one woman's name appeared on the list so selected.

The trial court and the Supreme Court of Kansas, held that defendant, petitioner, was not denied due process of law or the equal protection of the law, in being forced to trial before a jury selected in a manner not provided for by the statutes of Kansas, from a panel from which a group or class of eligible, qualified jurors, willing to serve, were intentionally and purposely excluded, and in selecting a part of the panel, legally eligible and qualified jurors, living in the township where defendant resided, and where the crime was alleged to be committed, were intentionally excluded.

The question is thus clearly presented as to whether the law and the procedure thereunder in this case, denied to the defendant due process of law and the equal protection of the law.

WHEREFORE, Your Petitioner prays that a writ of certiorari issue to the Supreme Court of Kansas to the end that the errors aforesaid may be corrected by this Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion Below

As stated above the decision of the Supreme Court of Kansas in this case is found in *State* v. *Neff*, 169 Kan. 116, and in 218 Pac. (2d) 248.

II

Jurisdiction

The judgment of conviction of appellant, petitioner, was affirmed by the Supreme Court of Kansas, on May 6, 1950, and petition for rehearing, filed in due time, was denied on the 16th day of June, 1950, and said judgment of conviction became final on said day. The Supreme Court of Kansas was the Court of last resort in the State, and the highest court in the State to which the case could be appealed.

In both the trial court and in the Supreme Court of Kansas, the petitioner specifically set up and claimed a right, privilege and immunity under the Constitution of the United States, in that in his trial he was denied due process of law and the equal protection of the law, as guaranteed to him under the Fourteenth Amendment, by being required, over his objection, to submit to trial by a jury selected from a jury panel from which a group and class of eligible, qualified jurors, able and willing to serve, were purposely and intentionally excluded from such panel, and that such panel was purposely and intentionally selected, so as not to represent a cross-section of the county in which it was charged that the crimes were committed.

III

Statement of the Case

We have stated above the facts in this case so far as pertinent to this petition.

IV

Specifications of Error

The Supreme Court of Kansas erred in holding that this petitioner had not been denied due process of law and the equal protection of the law, as guaranteed to him by the Fourteenth Amendment of the Federal Constitution, in being required to submit to trial, involving his life and liberty, before a jury selected from a panel from which a group and class of eligible, qualified jurors, willing to serve had been purposely and intentionally excluded, and a panel, which did not represent a cross-section of the county in which the crimes were alleged to have been committed, and in refusing to hold that the panel from which the jury was selected had been unlawfully and contrary to statutory mandate, drawn and selected.

V

ARGUMENT

The constitutional question involved in this case, is whether defendant, on trial for his life, was denied due process of law and the equal protection of the law, as provided by the Fourteenth Amendment, in being tried, over his objection, by a jury selected from a panel, from which a class and group legally qualified and eligible, and willing to serve as qualified jurors, were purposely and intentionally excluded from the panel.

This Court is not bound by the decision of the State Court, where a constitutional right is involved, but will examine

the record to determine whether the right was denied, in substance, as well as if directly and specifically denied in terms.

> "We concede the proposition, so earnestly urged on behalf of the plaintiff in error, that by the Fourteenth Amendment it is made the right and the consequent duty of this Court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a state, it is sought to arbitrarily deprive any person of his life, liberty, or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute."
>
> *Hodgson* v. *State,* 168 U. S. 262, 42 L. Ed. 461, 18 S. Ct. 80.

This same rule has been quite recently restated,——

> "When a Federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights."
>
> *Norris* v. *Alabama,* 294 U. S. 587, 79 L. Ed. 1075, 55 S. Ct. 579.

The evidence, without dispute showed, and it was stipulated, that for at least twenty years, women, eligible and qualified for jury service had been intentionally and deliberately excluded from the list of qualified and eligible jurors, from which list the panel for each year was drawn. It was stated by the trial judge, that he had instructed

those, charged with the duty of compiling such lists, to exclude the names of women from such lists. The trial judge then quashed the panel drawn from such lists, because the list had not been compiled as provided by law, and the panel was therefore illegally drawn, and was an invalid panel. He then selected the same panel, from which the jurors who were to try the defendant were to be selected. When this panel was exhausted he ordered 175 additional jurors drawn from this same jury box, which he had just held contained only names which had been selected contrary to law and a jury drawn therefrom invalid.

When 39 names were drawn from this jury box, the list therein was exhausted, and the Court then directed that the balance of the 175 names be selected from the assessments rolls of the county by the Sheriff, who had been busily engaged for over a year in making investigations and assembling evidence against this defendant, together with the Clerk of the Court, the County Clerk and Register of Deeds, but no juror residing in the township of defendant's residence, and where the crimes were alleged to have been committed should be selected.

The names of no women were on this list.

Defendant's rights were not only denied in substance, but actually.

While the actual exclusion of women, eligible, qualified and willing to serve as jurors, was fully proven, in fact stipulated, yet the exclusion of women from jury service, and discrimination against them may be shown by facts and circumstances.

> "A purpose to discriminate must be present, which may be proven by systematic exclusion of eligible jurymen of the prescribed race or by unequal application

of the law to such an extent as to show intentional discrimination."

Adkins v. *State of Texas,* 325 U. S. 398, 403, 404, 65 S. Ct. 1276, 1279.

While the word "race" is used in the above quotation, there appears to be no logical reason why the same rule should not apply to a class or group.

The Fourteenth Amendment, is not limited in its application to the colored race. It applies alike to the exclusion of black or white or any other race, where the members are citizens.

"Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment?"

Strauder v. *West Virginia,* 100 U. S. 303, 25, L. Ed. 664, 666.

In the same case it is said that the Fourteenth Amendment "is to be construed liberally to carry out the purpose of its power," and that "the constitution of jurors is a very essential part of the protection, such a mode of trial is intended to receive."

As to the claim that there were no adequate facilities in the court house for separate sleeping quarters for men and women, there are few, if any, court houses in Kansas which have sleeping quarters for even men.

The trial judge said he would take judicial notice that he had not in 19 years service ever kept a jury locked up over night.

If lack of facilities was a justification, or even an excuse, then colored people could be denied the right to jury service on the ground that there were no facilities for separate sleeping quarters, or no separate toilet facilities in the court house.

The amendment prohibits discrimination against a class as well as against a race, and may be proved by showing that no effort was made or steps taken to ascertain whether there are in fact any qualified to serve in the excluded class.

> "*Discrimination* can arise from the action of those selecting the list from which the panel is drawn, by excluding all of a certain *class* whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve." (Emphasis supplied.)
>
> *Hill* v. *State of Texas*, 316 U. S. 400, 404, 62 S. Ct. 1159, 1161.

The instruction by the trial judge to those who compiled the list from which the panel was drawn, to exclude, or rather not include, the name of any woman in the lists; the habitual exclusion of women from the lists for twenty years; the quashing of the panels because they were excluded; and the selection of the same panel by the trial judge, certainly shows beyond dispute, that women as a group or class, eligible, qualified and willing to serve as jurors, were discriminated against.

The trial judge proceeded to select the same panel, which he had just held was an invalid panel, because drawn from a list which had unlawfully excluded women therefrom, as a group or class.

> "The most important requirement," (in the drawing of the panel) "is that the panel shall be drawn, and not arbitrarily selected, and any act on the part of the clerk or other officers infringing that requirement is ground for challenging the array."
>
> 50 C.J.S. p. 892, Sec. 164.

When the Sheriff, appointed by the Court with three other county officials, to select additional jurors, from the assessment rolls, designated who would and who would not make a

good juror, and when no women were selected from this assessment roll, it certainly established arbitrary selection, and intentional discrimination.

There was no drawing of the panel, after it was quashed. It had been drawn from a list illegally prepared, and was thereupon named again in the panel.

The panel must be a cross-section of the entire county or district in which the crime is alleged to have been committed.

In the early case of *Hartshorne's Lessee* v. *Patton,* decided by the Supreme Court of Pennsylvania, at the September term, 1796, reported in 2 U.S. 228, 2 Dall. 252, 1 L. Ed. 309, it was held that in selecting a jury panel, by the sheriff, he could not exclude from the panel eligible jurors from one part of the county, on the ground that eligible jurors living in that particular part of the county were acquainted with the facts, and therefore were disqualified.

The case had been tried twice, resulting in a hung jury each time.

It seems to have been thought by the court that a hung jury resulted from the fact that jurors from the vicinity where the litigation arose, were prejudiced.

He, therefore, directed the sheriff, in selecting the panel, to avoid selecting anyone living in the vicinity where the litigation arose.

The Supreme Court, however, held that the question of qualifications of the jurors was a matter for the court, and not the sheriff, to determine, and that the panel should be selected from the entire county or district.

In reversing the case, it was stated:

> "A court cannot direct the sheriff to take a jury from any particular part of the county."
>
> *Hartshorne's Lessee* v. *Patton,* 2 U. S. 249, 2 Dall. 252, 1 L. Ed. 309.

The Sheriff was not the proper person to determine whether a man or a woman would be a good juror.

There was no authority in law for excluding those residing in the township where defendant resided and where the crimes were alleged to have been committed, from the panel.

In harmony with this early decision, and in harmony with the traditions upon which the jury system was and is based, it is said:

> . . . "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge."
>
> *Sioux City & Pacific R. R. Co.* v. *Stout,* 84 U. S. 745, 749 (S. C. 17 Wall, 657-665).

This clear statement was followed by a recent case, where it was held that eligibility and qualification for jury service is not confined to any class, or to any stratum of society, but are found in all strata and classes of our complex social system. The jury panel must be composed of a "cross-section" of the county or district.

> *Thiel* v. *Southern Pac. Co.,* 328 U. S. 217, 66 S. Ct. 984, 986.

The panel cannot be a "cross-section" of the community if all eligible and qualified for jury service in a certain

group or class, are intentionally and deliberately excluded from the panel.

The selection of the jury panel, from which the trial jury is chosen, "must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself requires that the jury be a "body truly representative of the community', and not the organ of any special group or class."

Classen v. *United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680.

One of the important elements in the State's case, was the motive for the commission of the alleged crimes. That motive was the violation of the sanctity of the family relationship.

Since when have men become the only "group or class" qualified to appraise the violation of the sanctity of the family relationship as a motive?

The statute has fixed the qualifications of jurors, and by that statute women are eligible for jury service. It is not for the court, township assessors, or mayors to add additional qualifications.

It is said in *Walter* v. *State,* 208 Ind. 231, 195 N. E. 268 98 A.L.R. 607, that:

> "Women must be considered by jury commissioners for service as jurors upon the basis of their personal qualifications, the same as men, without control or influence by the judge or other person, under a statutory provision that commissioners shall select jurors from the names of legal voters and citizens of the United States on the tax duplicate of the county for the current year, and shall select no one whom they have been or may be requested to select."

In this case it was held that the defendant, although a man, could complain of the exclusion of women from the jury.

It was also held that absence or lack of facilities for separating the men from the women was no justification or excuse for excluding women.

The jury, in the case now before the Court comprised entirely of men, selected from a panel composed entirely of men, found defendant guilty of slaying a man, but were unable to agree whether he had caused the death of the woman.

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. (Citing) This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."
>
> *Thiel* v. *Southern Pac. Co.*, 328 U. S. 217, 66 S. Ct. 984, 985, 986.

The women of Sumner County, as a group or class were excluded from the panel.

> "But they" (those who select the panel) "must not allow the desire for competent jurors to lead them into

selections which do not comport with the conception of the jury as a cross-section of the community."

Classen v. *United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680.

Sumner County, Kansas, is a rural, agricultural community, with two cities of the second class; Wellington with a population of approximately 7,500, and Caldwell with a population of 1800.

The population of the county is approximately 27,000. It is not an unreasonable presumption, that half of this population were women.

That half, as a group or class, was intentionally and deliberately excluded from the panel.

Manifestly, the panel did not represent a "cross-section" of the community.

It is true that the defendant has no right to complain if he is "given a *lawfully selected panel,* free from any taint of invalid exclusion or procedures in selection and from which all disqualified for cause have been excused." (Emphasis supplied.)

Frazier v. *United States,* 335 U. S. 497, 507, 69 S. Ct. 201, 207.

In the foot note in support of this proposition of law, is cited the case of *Fay* v. *New York,* 332 U. S. 261, 284, 285, 67 S. Ct. 1613, 1625, 1626, 91 L. Ed. 2043.

It would appear to be a logical conclusion from this statement of law, that a defendant had good cause to complain if he was tried by a jury not "lawfully selected", but selected from a panel which was unlawfully selected, which was not free from "taint of invalid exclusion."

Looking through the form to the substance, we find that the trial court held the panel illegally composed and drawn from a list from which eligible and qualified jurors, as a class or group, were excluded, and therefore quashed the

panel, then selected the same panel, and declared it a legal and lawful panel.

The case of *Fay* v. *New York*, 332 U. S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043, is not only clearly distinguishable from this case, but is wholly inapplicable.

In the *Fay* case there were 7,000 women on a jury list of 60,000 qualified for jury service.

In the opinion, the court, among other things, said:

> "But we know of no right of defendant," and we suppose it applies equally well to the state, "to have a specially constituted panel which would include all persons who might be fitted to hear their particular and unique case."
>
> "But the evidence does not show that women are excluded from the special jury. In this case three women talesmen were examined. One was pronounced 'satisfactory' by both sides and served on the jury" (p. 278).

This Court has recognized the loss of a distinct quality in the character of juries as well as the exclusion of a qualified class when women are excluded from jury panels in a number of cases. In *Ballard* v. *United States*, 91 L. Ed. 181 this Court said:

> "This point illustrates that the exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164, or an economic or social class; Thiel v. Southern P. Co., 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 A. L. R. 1412, supra, deprives the jury system of the broad base it was designed by Congress

to have in our democratic society. It is a departure from the statutory scheme."

Even if the trial court was correct in refusing to proceed under Sec. 43-129 to provide a panel drawn from a list of names containing the names of both men and women because of administrative difficulties, the petitioner was nevertheless entitled to have that section of the Kansas Statute followed in order that the jury panel from which he was required to select the trial jury might be drawn by lot, rather than in an arbitrary manner having no statutory authority.

In the case now before the court, not only that "women are excluded from" the list from which the panel was drawn, but it was stipulated that this had been done for twenty years, and the trial judge stated that he had instructed those authorized by law to make the list, to not include any women in the list.

So far as the claim of occupational discrimination was involved in the *Fay* case, the court found that there were three members of the jury who were members of a labor union, and that there was no evidence of occupational discrimination.

The additional names selected for the panel were not drawn or selected as provided by law and therefore constituted an invalid part of the panel.

The defendant further contends that he was denied the equal protection of the law and due process of law, in that the jury panel from which he was required to select the trial jurors was chosen in part in a manner not provided for by the Statutes of Kansas.

The Legislature of the State of Kansas has provided for the emergency that might arise by the quashing of a jury panel because of the improper preparation of the jury lists in two ways:

Section 43-128, *supra,* provides that if a challenge to the array of jurors shall be sustained during a term of court, then the trial court shall proceed to select a sufficient number of jurors for the term and cause a venire to issue for the same, naming the jurors so selected therein.

This case was tried first in the May, 1948 term of Court, next in the September, 1948 term of court, and next in the January, 1949 term of court.

Challenge to the array and a motion to quash the panel was sustained in the May, 1948 term of the trial court.

The Court then proceeded to select a jury under the provisions of Section 43-128.

Prior to the trial in the September, 1948 term of the court, the Judge of the trial court again sustained a challenge to the array and a motion to quash the panel.

The panel for the September, 1948 term of court had been drawn from the jury box from names placed therein during April of 1948. These names were placed in the jury box after the drawing of the panel for the May, 1948 term of the court. Therefore, the court again proceeded under Section 43-128 to select a panel of jurors for the September, 1948 term of the Court.

However, since it had been made to appear to the trial court in the September, 1948 term of that court that the list, made out by the township trustees and mayors of cities and deposited in the jury box, had been so made out and returned as to vitiate the panel, it promptly became the duty of the trial court under Section 43-129, *supra,* to issue his order to the trustees and mayors of cities to meet at the office of the County Clerk on a day to be named in such order and then and there to make out a list of qualified persons to serve as jurors for the balance of the ensuing year.

The evidence clearly showed, and the court so found that "the lists made out by the township trustees and mayors of cities and deposited with the County Clerk, and the

names taken therefrom and deposited in the jury box, have been so made out and returned or so deposited as to vitiate the panel'' (just as stated in Sec. 43-129, *supra*) then the court was to proceed as in this section.

The court refused to do so.

The additional panel was, therefore, clearly not drawn as provided by law.

The trial court at one time recognized that he should proceed at the proper time under Section 43-129. During the argument on the motion to quash the first panel of jurors during the May term of 1948, at which time counsel for the appellant were contending that the Court should then proceed under Section 43-129, the Court said:

> ''Now under Section 43-128 it becomes my duty to select the jurors for this term of Court. I think the section you refer to, Mr. Goodwin, will come into effect later'' (Appellant's Abstract p. 36).

Appellant again brought this matter to the Court's attention by filing a motion, prior to the beginning of the January, 1949 term in which term the defendant was tried for the third time and convicted, requesting that the Court proceed under Section 43-129 (Appellant's Abstract of Record, page 63).

Service of this motion was made not only upon counsel for the state, but a copy of the motion was mailed direct to the trial court (Appellant's Abstract of Record, page 66).

Notwithstanding that it had been made to appear to the Court and the Court well knew that any panel drawn from the jury box would necessarily be vitiated because of the manner in which the list had been prepared, and the exclusion of women therefrom, the trial court at all times refused to proceed under Section 43-129.

The defendant, petitioner, was not ''given a lawfully selected panel free from any taint of invalid exclusion, or procedure in selection.''

The Supreme Court of Kansas has held that the right of defendant to demand strict compliance with the statute in the selection of the panel is a "privilege" to which defendant is entitled.

In *State* v. *Jenkins*, 32 Kan. 477, the Court said:

> "The requirements of the statute as to the making of a list of persons to serve as jurors, and the selection of the panel therefrom, are in the nature of a privilege to the accused, and he has the right to insist that there shall be a substantial compliance with the law."

The Supreme Court of Kansas has likewise held that even though compliance with the statute might cause delay, this is no excuse or justification for not complying with the Statute.

In *State* v. *Edwards*, 64 Kan. 455, the Court said:

> "We perceive in this case no insuperable obstacle in the way of proceeding in the empaneling of a jury to try this case in the exact manner pointed out by the statute. So to have proceeded might, and in all probability would, have caused a short delay in the trial of the case, but such delay, if occasioned, is not a sufficient reason why the positive provisions of the act in question, intended to safeguard the property and liberty of the citizen litigant should be set at naught."

VI

Conclusion

We respectfully submit that defendant was denied his constitutional right of due process of law and the equal protection of the law, as provided by the Fourteenth Amendment of the Constitution of the United States in that he was denied the right to trial by a jury selected from a panel, representing a cross-section of the county in which the crimes were alleged to have been committed; that he was

denied the right to be tried by a jury selected from a panel from which no legally eligible and qualified group or class had been intentionally, deliberately and purposely excluded, that the writ should be granted, and that upon hearing on the merits, the decision of the Supreme Court of Kansas be reversed, with directions that defendant be tried by a jury selected from a panel representing a cross-section of the county in which the crimes are alleged to have been committed, and a panel from which no group or class of legally eligible and qualified jurors be excluded, because they belong to that group or class, and for all proper relief.

Respectfully submitted,

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No. 303.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

GEORGE NEFF,
PETITIONER AND APPELLANT BELOW,

vs.

STATE OF KANSAS,
RESPONDENT AND APPELLEE BELOW.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
ARGUMENT	13
I The Decision Below is Clearly Correct	14
II There is no Conflict of Decision	32
III No Important Question of Federal Law is Presented	32
CONCLUSION	33
APPENDIX	34

CITATIONS.

CASES:

Akins v. Texas, 325 U. S. 398, 400; 89 L. ed. 1692, 1694; 65 S. Ct. 1276	26
Allen-Bradley v. Wisconsin Employment Relations Board, 315 U. S. 740; 86 L. ed. 1154	16
Bailey v. State, .. Ark. .., 219 S. W. 2d 424, L. R. Anno	26, 31
Ballard v. United States, 329 U. S. 187; 91 L. ed. 181; 67 S. Ct. 261	26
Commonwealth v. Duca, Appellant, 312 Pa. 101; 165 A. 825, Anno. 9 A. L. R. 2d 661, 670, 671	23
Commonwealth v. Garletts, Appel. (No. 2), 81 Pa. Superior Ct. 271	23
Ex Parte Virginia, 100 U. S. 339, 345; 25 L. ed. 676, 679	29
Fay v. New York, 332 U. S. 261; 91 L. ed. 2043; 67 S. Ct. 1613	20, 25, 27, 31

CITATIONS—(Continued)

Page

Glasser v. United States, 315 U. S. 60; 86 L. ed. 680; 62 S. Ct. 475 26

Hale v. Kentucky, 303 U. S. 613; 82 L. ed. 1050, 1058; 58 S. Ct. 753 23

Martin v. Texas, 200 U. S. 316; 50 L. ed. 497; 26 S. Ct. 338 26

Moore v. Nation, 80 Kan. 672; 103 Pac. 107 18

Norris v. Alabama, 294 U. S. 587; 79 L. ed. 1074; 55 S. Ct. 579 26

People v. Parman, 14 Cal. 2d 17; 92 Pac. 2d 387 ... 23

People v. Shannon, 203 Cal. 139; 263 Pac. 522 23

Rawlins v. Georgia, 201 U. S. 638; 50 L. ed. 900; 26 S. Ct. 560 25

Senn v. Tile Layers Protective Union, 301 U. S. 468; 81 L. ed. 1229 17

Snowden v. Hughes, 321 U. S. 1, 8, 9; 88 L. ed. 497, 502, 503; 64 S. Ct. 397 26

State v. Allen, 98 Kan. 778; 160 Pac. 795 .....16, 41

State v. Schmidt, 74 Kan. 627; 87 Pac. 742 ....9, 16, 40

Strauder v. West Va., 100 U. S. 303; 25 L. ed. 664 25

Tarrance v. Florida, 188 U. S. 519, 47 L. ed. 572, 23 S. Ct. 402 26

Thiel v. Southern Pac. Co., 328 U. S. 217; 90 L. ed. 1181; 66 S. Ct. 984 26

United States v. Chemical Foundation, 272 U. S. 1; 71 L. ed. 131 22

United States v. Clarke, 20 Wall. 92, 108; 22 L. ed. 320, 323 22

United States v. Nix, 189 U. S. 199, 205; 47 L. ed. 775, 777; 23 S. Ct. 495 22

United States v. Page, 137 U. S. 673, 679, 680; 34 L. ed. 828, 830, 831; 11 S. Ct. 219 22

Walker v. United States, 93 Fed. 2d 383 20

CITATIONS—(Continued)

STATUTES:

	Page
General Statutes, 1935, 43-101	15, 34
" " " 43-102	34
" " " 43-103	35
" " " 43-104	35
" " " 43-105	36
" " " 43-106	36
" " " 43-111	37
" " " 43-116	37
" " " 43-117	24, 38
" " " 43-121	38
" " " 43-122	39
" " " 43-128	6, 7, 9, 10, 14, 15, 16, 17, 20, 39
" " " 43-129	6, 8, 9, 14, 15, 16, 39
" " " 43-130	40
General Statutes 1947 Supplement, 43-107	36
" " " " 43-108	21, 36
" " " " 43-109	21, 37
" " " " 43-110	37
" " " " 43-120	38

MISCELLANEOUS:

Kansas Constitution, Sec. 10	34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 303.

GEORGE NEFF,
PETITIONER AND APPELLANT BELOW,

vs.

STATE OF KANSAS,
RESPONDENT AND APPELLEE BELOW.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The decision of the Supreme Court of Kansas, the Court below, in this case is reported in *State v. Neff*, 169 Kan. 116; 218 Pac. 2d 248.

Jurisdiction.

We do not believe that petitioner has complied with Rule 12 of the rules of this Court in presenting his jurisdictional statement.

Questions Presented.

Petitioner in his Specifications of Alleged Error appears to present two questions, namely:

I.

A claim that due process of law was denied him by an absence of women from a state jury panel in a state where women are not required to serve on juries, and although the trial court found facilities for women jurors inadequate.

In opposition, respondent will show:

(1) Facilities for women were inadequate.

(2) Petitioner is not a member of the class he complains was excluded.

(3) Due process of law was not denied him.

(4) The decision of the Court below was clearly correct. There is no conflict of decision and there is no important question of Federal Law.

(5) No reason exists for granting the writ upon this ground.

II.

Petitioner makes a general claim that a jury panel was "unlawfully" selected.

In opposition, respondent will show:

(1) There is no factual basis for petitioner's claim.

(2) Statutory mandates were followed in selecting the jury panel.

(3) Petitioner accepted as satisfactory all of the individual jurors who sat in his case and has never shown

that any of the individual jurors were disqualified for any reason or were otherwise than wholly impartial jurors.

(4) The decision of the Court below was clearly correct. There is no conflict of decision and no important question of Federal Law is presented.

(5) No reason exists warranting grant of the Writ.

Statute Involved.

There is no Federal Statute whatever involved.

Statement.

This is basicly a simple case. It has been made somewhat complex by technical defenses.

George Neff, a prosperous farmer, was charged with the murder of his wife by poison, and his brother-in-law, by shooting from ambush at night. (Abstract 7) For about twenty years there had been sexual relations between Neff and the wife of the murdered man. (Abstract 118) She, the paramour, was also the sister of Neff's wife. (Abstract 105) The wife of the murdered man was deemed cleared of complicity in the murders by the State following tests and interrogation. Neff, after consulting his attorney, made a purely voluntary confession in which he fully and freely admitted his guilt, and absolved his paramour of any complicity. (Counter Abstract 67-75, Abstract 99-125) In his confession he supplied details, including how he obtained the murdered man's gun with which the murder was committed. (Abstract 107) This was corroborated by

a witness who said he saw Neff enter the murdered man's home at the time in question. (Abstract 184) He raised no question but that his confession was entirely voluntary and made without threats, duress, promises or any other impropriety. (Counter Abstract 8) After discussing defenses of insanity and self defense with the officers, (Counter Abstract 69) he apparently decided to simply deny that his confession was true, and did make such a denial. (Abstract 171) The corpora delicti and causes of death were admitted. (Counter Abstract 9-10)

He was tried three times in the District Court of Sumner County, Kansas, the first two trials resulting in hung juries, and the third in conviction of the murder of Wynn, his paramour's husband, and a life sentence fixed by the jury. (Counter Abstract 7) Kansas law requires a jury upon conviction of first degree murder, to decide between the death penalty and a life sentence. Difficulty was encountered in obtaining impartial jurors for the third trial, due to the fact that many of the people of this agricultural county held fixed opinions as to the guilt or innocence of the accused. Two hundred seventy-five jurors were interrogated and seven and one-half days of voir dire examination were consumed in selecting the jury. (Counter Abstract 1)

Petitioner accepted as satisfactory, however, all of the jurors who sat in his case and rendered the verdict, (Counter Abstract 19) and waived peremptory challenge as the last juror was selected, an alternate juror permitted under Kansas law. (Counter Abstract 12)

Certain of the Kansas statutes pertaining to juries are material in a consideration of this petition. Petitioner has supplied the Court with some of them, but some that are requisite to a fair appraisal of the petition are omitted by him. Therefore, we annex hereto an appendix which sets forth verbatim all Kansas jury statutes and constitutional provisions believed material, in order that this Court may have available all Kansas legislative and constitutional directives in one convenient compilation. We also include in this appendix for the convenience of this Court, extracts from some of the more applicable Kansas decisions construing these directives from time to time.

With this preliminary explanation, the facts of the selection of the jury in this case will be stated as simply as possible.

Petitioner's first two trials were nullities, having resulted in hung juries and mistrials, and, of course, they have no bearing on his instant petition. Petitioner raised numerous objections to the two panels from which those first two petit juries came, including his present claim of exclusion of women, but neither convicted him. It is obvious that fair jurors must have been obtained for the petit juries in those first two trials; a complaint that he was prejudiced by juries that failed to find him guilty must be considered novel at the very least.

There were irregularities in the selection of the basic panels from which these first two juries came. Rural, well-meaning township officers, directed by law to select veniremen, but lacking in understanding of the niceties

of the judicial process, had used assessment rolls for the wrong years, had used enumeration rolls instead of assessment rolls, and had not inquired of women whether they wish to serve as jurors. (Abstract 49, 55) This has been true for many years in this rural county, with the apparent acquiescence of the Bar throughout many jury trials, including those of murderers.

Petitioner, however, challenged these panels and the court quashed them.

This left the court without a jury panel and with jury cases for trial immediately.

The legislature in Kansas has provided a statute furnishing machinery to deal with such a situation: G. S. 1935, Sec. 43-128. Petitioner contended another statute was applicable, G. S. 1935, Sec. 43-129, and it is therefore here mentioned.

The District Court heard full arguments as to how a jury should be chosen for both of these first two trials, ruled that it was its duty to select a panel under 43-128 and proceeded to do so. There being no inherent vice in the individuals composing the vitiated panels, and the court being satisfied they possessed the qualifications of jurors, it selected the same individuals to compose new panels under 43-128. Petitioner accepted as satisfactory, individually, the petit jurors chosen from the panel, and their fairness toward petitioner is evident from their failure to convict him.

Sumner County, Kansas, has no courthouse, its old courthouse having been condemned and torn down many years ago. District Court is held in a makeshift space

in the City Office Building of the city of Wellington. For some time prior to this case, the District Court had been of the opinion that inadequate facilities existed to accommodate jurors of both sexes. (Abstract 14, 206) It may be conceded that women were not deliberately excluded from the jury lists for this particular case, but had not served on juries in this county for years. In its contemplated new courthouse, Sumner County will have facilities for both sexes.

The January, 1949, term of the District Court, during which petitioner's third trial and conviction occurred, commenced January 4, 1949.

On that date petitioner called up for hearing a motion to quash the jury panel. The court quashed the panel, finding that the assessors, township trustees and mayors of cities had failed to perform their duties in listing veniremen. (Abstract 66-72)

It was not claimed that there was anything inherently wrong with the jurors individually composing the quashed panel. Finding that they all had the qualifications of jurors, and deeming them individually suited as jurors, the trial court found it his duty to appoint a new panel of jurors for the term under 43-128, and did so, appointing substantially the same jurors who composed the original panel, after eliminating those excused for various reasons. (Abstract 74-78)

The statute in question, G. S. 1935, 43-128, provides as follows:

> "That whenever it shall be made to appear to the court that the township trustees and mayors of

cities as provided for in the act to which this is an amendment, have failed to make the lists from the assessment rolls of the previous year, or that from any other cause the lists furnished by them to the county clerk or the names taken therefrom and deposited in the jury box have been so returned or deposited as to vitiate a panel drawn therefrom, it shall be the duty of the judge of such court to forthwith select a sufficient number of jurors for the term, and cause a venire to issue for the same, naming the jurors so selected therein."

It clearly provides for selecting a jury for the current term of court.

The statute whose application was suggested by petitioner, 43-129, provides specifically for new jury lists for *subsequent* terms for the ensuing year. Sumner County has three terms of court each year, January, May and September. Following the hung jury in the September, 1948 term, petitioner did not argue any motion attacking the regular jury panel until January, 1949, term had already commenced. He was to be tried at that term and a jury for that term, not the ensuing year, was immediately needed. Not only was this true for his case, but other jury cases were set for trial at this January, 1949, term, and the court had no jury panel for any of these cases after quashing the regular panel. The business of the court required a jury panel at once, not for some subsequent term. Moreover, even if the trustees and mayors were called in under 43-129, they could not have included women as jurors because there were no lists of eligible women who had not

claimed exemption from which to select women as jurors. The assessors had not performed their duty.

On the facts alone, therefore, 43-129 was not applicable, as the Kansas Supreme Court as far back as 1906 had previously held. (*State v. Schmidt,* 74 Kan. 627.)

The third trial of this case commenced.

Three days later the jury panel was exhausted without obtaining a petit jury. (Abstract 79) This situation was not and could not have been anticipated by the court, counsel for State or counsel for appellant. It had not happened in either of the two previous trials. The court informed counsel for plaintiff and defendant that he would select additional jurors for a panel. (Abstract 216) (Following G. S. 1935, 43-128) Then the court entered his order directing the same four county officials who normally draw jury panels, to draw 175 additional names from the jury box (thereby obtaining names of jurors who were basically qualified for jury service as to matters of residence, age, etc.) and submit them to the court for "final selection" of a jury panel. (Abstract 79) The record shows no objection made at this time by defendant to the court's following G. S. 1935, 43-128, and having names drawn from the jury box from which to make his selection, although defendant had notice of the court's intentions. (Abstract 89)

Thirty-seven names were drawn and the jury box was found to be exhausted. (Abstract 81) This fact being referred to the court, faced as he was with a trial of

a murder case already under way, and need for additional jurors, still following G. S. 1935, 43-128, (Abstract 80-81), he directed the county clerk, register of deeds, sheriff and clerk of the district court, the same four officials who normally draw juries, to list 138 more persons possessing the qualifications of jurors from the county tax rolls, "as an aid to this Court in making the selection of qualified veniremen." (Abstract 81)

The court made his final selection of the names supplied him from the jury box and tax rolls, and set forth that selection in a written order, as follows:

> "Now on this 22nd day of April, A. D. 1949, the same being one of the regular judicial days of the January, 1949, term of the above named court, and a list of the names of persons as prospective veniremen having been presented and submitted to the Judge of the court pursuant to the order of the court heretofore made on the 21st day of April, A. D. 1949, and the Court having made an examination of said list and of the names of the persons therein listed, and finding that an order should be made making a selection of veniremen for service as jurors—
>
> IT IS, THEREFORE, BY THE COURT, DULY CONSIDERED, ORDERED AND ADJUDGED that the following named persons be and they are hereby selected as veniremen for service as jurors at the January, 1949, term of said court, to-wit:"

(The court then listed the names selected by him under 43-128.)

Petitioner made an effort to insinuate some impropriety in the preparation of the lists submitted to the court. *He failed utterly to show any improper action*

by any official involved. The evidence is set forth at Counter Abstract 52-58, and the Kansas Supreme Court specifically found: "There is no evidence the officers who aided the Court acted otherwise than in good faith. Speculation to the contrary is entirely devoid of factual support." (Opinion below, 134)

In this connection we should state that petitioner, at page 20 of his petition sets forth some allegations in a motion he filed, allegations wholly unsupported by the record and merely his own statements, in such a manner that they leave the impression that they are facts supported by the record. On the same page the record is misquoted on a material matter. He quotes a witness as saying: "Someone he thought wasn't eligible. He said he didn't think that was the right man for a juror." The witness actually said: "Someone he thought wasn't eligible, he said he didn't think that was the right man for a juror." There were not two separate sentences. Dividing the statement into two sentences leaves the impression that comment was made that someone wasn't the "right man" for a juror in a sense of bias. The record does not contain any such statement. (Counter Abstract 58) We mention these matters to clarify a possible misleading impression.

No women were on any jury panel or petit jury involved because the trial court deemed facilities for women inadequate. (Abstract 14, 206) Petitioner made some effort to show that adequate facilities for women existed (Abstract 33), but he did not show that inclusion of women on the juries in Sumner County could be had

without erroneous separation of the jury on occasion, to the detriment of the judicial process. The court below considered the question fully and so ruled. (Opinion below, 135) Each individual juror who sat on the petit jury in this case, although questioned at length on voir dire examination by defendant, was accepted by defendant without challenge for cause. None of the jurors who heard the cause and rendered the verdict were challenged for cause by defendant. (Counter Abstract 19)

Petitioner has never presented any evidence that any juror was biased, prejudiced, violated his oath, or otherwise denied the petitioner a fair trial as a juror. (Counter Abstract 20)

Petitioner, in his petition makes the statement that the trial court, with reference to selection of jury panels, directed that no jurors from Downs Township where the petitioner resided, would be included.

The court's orders as to the third trial are set forth at Abstract 74, 75, 76, 77, 78, 79, 80, 81, 82 and 83. We have examined them carefully. We do not find that any of these orders relative to the trial from which this petition is taken, direct the omission of veniremen from Downs Township. We believe that an inspection of these orders by this Court will cause it to reach the same conclusion.

Argument.

The issue in this case is simple, and the facts—once separated from unsupported rhetoric and understood—make it clear that review by this Court on certiorari is not warranted. In no sense are important questions of Federal law really presented.

A trial court, finding that facilities for women jurors were inadequate in a rural Kansas county with no courthouse, did not include women on a jury panel, and petitioner, a man—not a woman—complains that the Federal Constitution is violated thereby, but did not show that adequate facilities existed for women.

Diversionary arguments, tending to obscure the real issue, to the effect that the trial court failed to follow statutory directives in selecting a jury, and an insinuation of bad faith on the part of public officials who aided the court in selecting a jury, are devoid of factual support, however zealously urged.

Petitioner accepted as satisfactory every juror who sat in his case, and has never offered any evidence that any juror was biased, acted improperly, or otherwise denied him a fair trial.

On the record the decision of the Supreme Court of Kansas was manifestly correct. There is no asserted conflict of decision and could be none on this record. Manifestly there is no important question of Federal law requiring decision by this Court.

I.

The Decision Below is Clearly Correct.

After a careful and thorough examination of the entire record, the Kansas Supreme Court ruled:

> "There was no discrimination against the defendant in the exclusion of women jurors and there is no indication prejudice resulted to him from their absence on the jury.
>
> "There is no evidence nor the remotest indication defendant was not tried by an impartial jury, and we find he had a fair trial by such a jury.
>
> "Where facilities to keep jurors together should occasion arise to make that desirable, are, in the opinion of the court, wholly inadequate if the jury consists of both men and women, and there is an entirely insufficient showing of adequate facilities, such facts will be considered by this court in determining whether the trial court discriminated against the defendant in the exclusion of women jurors.
>
> "An intimation of bad faith on the part of officials who aided the district judge in the preparation of a new jury list examined and found to be wholly without factual support." (Opinion below, 118)

A.

Petitioner contended the jury was not selected according to law:

(1) Petitioner claimed the court should have followed G. S. 1935, 43-129 rather than 43-128.

(2) Petitioner claimed selection by the court as jurors of members of a jury panel previously quashed upon technical grounds was unlawful.

(3) Petitioner claimed the court improperly delegated his selection authority.

(4) Petitioner insinuated some impropriety on the part of those preparing lists from which the court selected a jury panel.

The court below correctly decided against all of his contentions.

(1) Petitioner claimed the court should have followed G. S. 1935, 43-129 rather than 43-128. 43-128 clearly provides for selecting a jury for the *current term* of court and says:

> "It shall be the duty of the judge of such court to forthwith select a sufficient number of jurors for the term."

43-129 clearly provides for selecting new jury lists for *subsequent terms* for the ensuing year, and it says:

> "It shall be the duty of the judge of such court to issue his order to said trustees and mayors of cities to meet at the office of the county clerk on a day in said order named and then and there to make out a list of persons to serve as jurors for the balance of the ensuing year."

Sumner County has three terms of court each year, namely: January, May and September. Following the hung jury in the September, 1948 term, petitioner did not argue any motion attacking the regular jury panel until the January, 1949 term had already commenced. He was to be tried at that term and a jury for that term—not the ensuing year—was immediately needed. Furthermore, under existing law (G. S. 1935, 43-101) a regular jury panel would be listed and in the jury

box by the following term of court, namely: the May, 1949 term, and no useful purpose could be served by providing a special panel for the ensuing year under 43-129, when a regular panel would most certainly be in existence by the next term of court. Other jury cases in addition to petitioner's case were set for trial at this January, 1949 term, and the court had no jury panel for any of these cases after quashing the regular panel. The business of the court required a jury panel at once—not for some subsequent term.

The Kansas Supreme Court had found it necessary previously to construe these two sections of the state statutes relative to juries, and as long ago as 1906 had specifically said that what is now 43-129 provided: " *** for the furnishing of new lists of persons to serve as jurors during subsequent terms for the ensuing year." (*State v. Schmidt*, 74 Kan. 627) Again, a few years later, in *State v. Allen*, 98 Kan. 778, the court had occasion to reaffirm its position and again hold that 43-128 was the applicable statute to secure jurors for a term of court after a panel had been quashed. In the opinion below the Kansas Supreme Court again decided that 43-128 provided the proper proceedure upon the facts, making reference to its earlier decisions on the point mentioned above. (Opinion below, 133)

This Court is aware that it has long ruled that the construction and application of a state constitution and statutes by the highest court of the state is conclusive on review by the Supreme Court of the United States. (*Allen-Bradley, local, v. Wisconsin Employment Rela-*

tions Board, 315 U. S. 740, 86 L. ed. 1154; *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 81 L. ed. 1229.)

(2) Petitioner claimed selection by the court as jurors of members of the jury panel previously quashed upon technical grounds was unlawful.

The court quashed the jury panel upon the technical grounds that the assessors, trustees and mayors had not performed their duties, finding that some jurors had been selected from enumeration rolls rather than assessment rolls; that some jurors had been selected from assessment rolls for the wrong year and that the assessors had not inquired of women, whether they desired to be exempt from jury duty. In no instance did the court have before him or pass upon any intimation that any given juror was not personally qualified in all respects for jury duty. Obviously the mere fact that a jury panel was selected from an assessment roll for the year 1948 rather than the year 1947, as provided by law, does not mean that in fact this same juror was not listed on both rolls, and therefore, that the technical objection could not go to his qualifications as a juror. Petitioner does not claim, and has not and cannot claim that any juror who served was lacking in the qualifications of a juror.

43-128, as the court below found and held, does not direct whom the judge shall select as jurors or what method he shall employ in making the selection. (Opinion below, 118)

The statute in question directs the court to select jurors, and unquestionably means jurors possessing the

lawful qualifications required. To go beyond the plain intent of the statute and to say that a technical defect in a jury panel which does not go to the individual qualifications of a man to serve as a juror, bars him individually from jury service, is sophistry.

The Kansas Supreme Court had occasion many years ago, in *Moore v. Nation,* 80 Kan. 672, to comment on the nature of the selection of jurors, and among other things, it said:

> "To make effectual the constitutional guaranty of the right of trial by jury the district court possesses, by virtue of the sovereignty reposed in it, inherent power to provide itself with a jury. The legislature may aid and regulate the exercise of this power, but the selecting of jurors from the inhabitants of the proper territory to determine issues of fact in court is a court function, cognate with that of hearing and deciding, *** " (Syl. 2, p. 672)
>
> * * * * *
>
> "Whenever the statutory measures for obtaining petit jurors have failed or have been exhausted the court itself issues an open venire and brings in a jury as a measure indispensible to the exercise of its jurisdiction. (Clawson v. United States, 114 U. S. 477, and cases cited in the opinion; 12 Encyc. Pl. & Pr. 274; 24 Cyc. 230.) And if every law on the statute books relating to the selecting and summoning of jurors was repealed the courts would go on selecting and summoning them without any interruption of the administration of justice.
>
> "The twelve jurors who are finally sworn to try the cause are in fact selected for the purpose by the court as a court, and the assembling of a large number from which to choose is merely an earlier stage of the same process. At common law, when

the issues were made up, the judicial precept, *venire facias,* issued to bring in a jury. The selection and the summons were made at the same time. If the sheriff and the coroner were both disqualified the court itself appointed elisors to make the selection (3 Black. Com. 354), and here may be found the common-law prototype of the judicial power to appoint jury commissioners. But the decisions identify this power with that of the court to select the jury. (685, 686)

* * * * *

"True, the legislature usually intervenes, as it may rightfully do, and provides machinery for supplying the court with jurors. Sometimes the judges themselves are made members of the body designated to select jurors. (See Commonwealth v. Manfredi, Appellant, 162 Pa. St. 144; The State v. Squaires, 2 Nev. 226.) Frequently it is left to the judges to make the selection personally when other measures are inadequate or fail, as indicated in State v. Kendle, supra, and as they do in this state. But whatever regulations the legislature may make, and whatever aids the legislature may furnish, the selecting of persons from the inhabitants of the proper territory to sit as jurors for the trial of issues of fact in court forms a department of the business of the court coordinate with that of hearing and deciding, *** " (p. 687)

It is elementary that petitioner's rights as to the impartiality of individual jurors are fully preserved by his right to voir dire examination and challenges both for cause and peremptory. Very lengthy voir dire examination of all jurors was conducted by petitioner. He accepted as satisfactory, every juror who sat in his case. He waived peremptory challenge as the last

juror was selected, an alternate juror permitted under Kansas law. He has never offered any evidence to show that any juror was not impartial or was biased or prejudiced or otherwise denied him a fair trial. As was said in *Fay v. New York*, 332 U. S. 261, 91 L. ed. 2043, 67 S. Ct. 1613:

> "It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case."

Clearly the decision of the court below that there was nothing unlawful in the trial court's actions in this respect, was correct.

(3) Petitioner claimed the trial court improperly delegated its selection authority under 43-128.

This contention is not included in the instant petition, but was before the State Court. The trial court merely followed the Federal trial court's practice of calling to his aid responsible persons to procure names of qualified veniremen from whom to select a jury panel. The record shows he ordered the list of names to be submitted to him for his own selection and that he made his independent selection. That was his duty. He exercised it under proper authority. There was no delegation in fact. The court below (Opinion below, 134) made mention of the case of *Walker v. United States*, 93 Fed. 2d 383, as clear cut authority in the premises.

(4) Petitioner insinuated some impropriety on the part of those preparing lists from which the court selected a jury panel.

Petitioner's claims in this respect are wholly devoid of factual support. He failed utterly to show any improper action by any official involved. The evidence is set forth in Counter Abstract 52-58 and Abstract 88-93 and the court below clearly found there was no evidence the officers who aided the court, acted otherwise than in good faith, saying "Speculation to the contrary is entirely devoid of factual support." (Opinion below, 134)

In Kansas regular jury panels are drawn by four public officials: The County Clerk, the Clerk of the District Court, the Sheriff and the Register of Deeds, as provided by G. S. Supp. 1947, 43-108 and 43-109. The trial court, in calling for assistance in securing lists of potential veniremen who were basically qualified in such matters as residence, age, etc., very naturally called upon the same four public officials who normally draw regular juries, to aid him.

Petitioner charged that the sheriff, whose duties required him to have the petitioner in custody, was not a proper person to so act, but petitioner went further than this. He endeavored to produce evidence from the mouths of the witnesses themselves who were present when the jury lists he attacks were compiled, as to exactly what happened. That evidence not only failed to show any impropriety on the part of any of the four officials involved, but it affirmatively showed that there was no impropriety or bad faith on the part of any of those four officials. The trial court merely adopted as his aides four public officials, associated

with the jury process by statute, and they did not act otherwise than in good faith, regardless of petitioner's impatient rhetoric to the contrary.

In the absence of any proof to the contrary, there is a very strong presumption embodied in the maxim, "omnia praesumuntur rite esse acta," that public officers have properly discharged the duties of their office and performed faithfully those matters with which they are charged. Stated in another way, the courts will presume, in the absence of evidence to the contrary, that public officers have not culpably neglected or violated their official duties and have not acted illegally in the doing of any official act.

(*United States v. Chemical Foundation,* 272 U. S. 1; 71 L. ed. 131. Confiscation Cases;
(*United States v. Clarke*), 20 Wall. 92, 108; 22 L. ed. 320, 323;
United States v. Page, 137 U. S. 673, 679, 680; 34 L. ed. 828, 830, 831; 11 Sup. Ct. Rep. 219;
United States v. Nix, 189 U. S. 199, 205; 47 L. ed. 775, 777; 23 Supp. Ct. Rep. 495.)

At page 20 of his petition, as we have previously remarked, petitioner sets forth a motion filed by him in which he makes some allegations of bias on the part of the County Sheriff. Petitioner never proved these allegations and this statement from his motion is wholly unsupported from the record and is merely his own statement. Due to the manner in which it is presented, it appears designed to leave the impression on first reading, that it was based upon evidence. To prevent a possible misleading impression, we call the Court's

attention to the fact that the allegation is a motion filed by petitioner only and is not evidence from the record.

There being no factual basis in the record for petitioner's claim of impropriety, the ruling of the lower court was clearly correct.

B.

Petitioner contended that due process of law was denied him by the absence of women from a state jury panel.

It has previously been shown in our Statement of Facts that the trial court deemed facilities for women jurors in the county concerned, inadequate and that there was an entirely insufficient showing of adequate facilities for both sexes. It is obvious that petitioner is a male and not a woman.

The difficult problem presented by the lack of available appropriate accommodations for the two sexes frequently has been treated as a material factor in determining whether women and men should be called for jury duty. Decisions of trial courts to exclude women from jury service by reason of inadequate facilities have been sustained frequently.

Hale v. Kentucky, 303 U. S. 613; 82 L. ed. 1050, 1058; 58 S. Ct. 753;
People v. Parman, 14 Cal. 2d 17; 92 P. 2d 387;
People v. Shannon, 203 Cal. 139; 263 Pac. 522;
Commonwealth v. Garletts, Appel. (No. 2), 81 Pa. Superior Ct. 271;
Commonwealth v. Duca, Appellant, 312 Pa. 101; 165 A. 825;
Anno. 9 A. L. R. 2d 661, 670, 671.

The courts in Kansas do not provide their own court rooms. The administrative officials of the counties involved are vested with that responsibility. When many years ago the Sumner County Courthouse was condemned and torn down, the administrative officials of the county felt they could not, and in any event did not immediately replace the courthouse. As a matter of fact, they are now preparing to provide the county with a modern new courthouse, with facilities for both sexes. This Court, however, can readily comprehend the difficulties besetting a trial court compelled to hold jury trials in a makeshift space in a small office building.

As pointed out by the court below, the State of Kansas fully recognizes the basic desirability of including women on its juries. Although not provided for in the Constitution of Kansas, and not required by law to serve, its legislature has accorded women the right to serve if they so desire. (G. S. 1935, 43-117) As the court below said:

> "Women jurors are properly recognized as rendering a service fully equal to that of men. In some districts, however, where facilities are wholly inadequate for women jurors in case it should be considered protection of the judicial process required jurors to be kept together, an entirely different practical problem arises." (Opinion below, 137)

The decision of the court below, therefore, that facilities for women jurors being inadequate, no discrimination against petitioner resulted from their exclusion, was clearly correct.

At the bottom of page 26 of his petition, petitioner makes an argument that lack of facilities might some time result in colored people being denied the right to jury service in Kansas, on the ground that there were no separate facilities for colored people.

This Court is probably aware that Kansas does not indulge in racial segregation, but if there is any doubt whatever, we believe the Court should be aware that there is no racial segregation in Kansas; that Negros attend the same schools as white people, use the same hospitals and theatres, eat in the same restaurants, sleep in the same hotels and are in no manner subject to the denial of their civil equality, which we understand obtains in some states.

This might well conclude the matter, but the court below gave full consideration to all of petitioner's contentions, and we will here do so.

It should be mentioned that petitioner, not being a member of the excluded class, and not having shown any actual prejudice to him from the exclusion of women, it may be questioned whether discrimination has been demonstrated. This Court has frequently held that a defendant's objections to exclusions from the jury when he was not a member of the excluded class, may not be entertained.

Fay v. New York, supra;
Rawlins v. Georgia, 201 U. S. 638; 50 L. ed. 899; 26 S. Ct. 560;
Strauder v. West Va., 100 U. S. 303; 25 L. ed. 664.

The great weight of authority is in harmony with this rule.

Bailey v. State, .. Ark. .., 219 S. W. 2d 424, L. R. Ann. following the Bailey case, p. 661, Vol. 9 A. L. R. 2nd.

Although the court below did not rest its decision upon this ground, preferring to rule comprehensively, it mentioned it in its opinion. (Opinion below, 137)

When discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant.

Tarrance v. Florida, 188 U. S. 519; 47 L. ed. 572; 23 S. Ct. 402;
Martin v. Texas, 200 U. S. 316; 50 L. ed. 497; 26 S. Ct. 338;
Norris v. Alabama, 294 U. S. 587; 79 L. ed. 1074; 55 S. Ct. 579;
Snowden v. Hughes, 321 U. S. 1, 8, 9; 88 L. ed. 497, 502, 503; 64 S. Ct. 397;
Akins v. Texas, 325 U. S. 398, 400; 89 L. ed. 1692, 1694; 65 S. Ct. 1276.

The Kansas Constitution makes no provision for women jurors. Petitioner conceded in the Court below that all the Kansas Constitution provides is a public trial "by an impartial jury". (See appendix for constitutional provision)

Petitioner in the court below cited Glasser v. United States, 315 U. S. 60; 86 L. ed. 680; 62 S. Ct. 457; Thiel v. Southern Pacific Co., 328 U. S. 217; 90 L. ed. 1181; 66 S. Ct. 984; Ballard v. United States, 329 U. S. 187; 91 L. ed. 181; 67 S. Ct. 261.

The Court below gave serious consideration to these decisions of this Court, together with the decision in Fay v. New York, supra. They remarked that the Federal practice with respect to women jurors is now followed in various judicial districts in Kansas, where adequate facilities for women exist. (Opinion below, 137)

Respondent does not dispute the Glasser, Thiel, Ballard cases. Respondent does not believe that this Court considers them in conflict with the particular facts of this case. While petitioner makes some statement that the jury here was not a cross-section of the community, he makes that argument only on the ground that women were not on the jury. In no other sense has he claimed nor can he claim that the jury panels and petit juries involved were not cross-sections of the community geographically, racially, occupationally and in all other respects other than the fact that women were not among the jurors. We believe that certain quotations from Fay v. New York, supra, particularly since that case discusses the Glasser, Thiel and Ballard cases cited by petitioner, are appropriate at this point.

> "5. Since Congress in implementing the Fourteenth Amendment has enacted only that no person shall be disqualified for jury service on account of race, color, or previous condition of servitude, one who would have the judiciary intervene on grounds not covered by the statute must prove clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process."

> "We do say that since Congress has considered the specific application of this Amendment to the

State jury systems and has found only those discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process."

"6. In questioning the composition of a jury, a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination."

* * * * *

"12. An accused is not entitled under the constitutional requirement of due process to anything more than a jury that is neutral; he has no constitutional right to friends on the jury."

"This Court has long dealt and must continue to deal with these controversies from state courts with self-imposed restraints intended to protect itself and the state against irresponsible exercise of its unappealable power."

The Fourteenth Amendment, in addition to due process and equal protection clauses, declares that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." So empowered, the Congress on March 1, 1875, enacted that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit jurors in any court of the United States or of any State, on account of race, color, or previous condition of servitude;" and made it a crime for any officer to exclude any citizen on those grounds. (March 1, 1875) 18 Stat. 336, 337, c 114, 8 USCA para 44, 2 FCA title 8, para. 44. For us the majestic gen-

eralities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination. This statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress. Referring to the provision empowering Congress to enforce the Fourteenth Amendment, it is said that "All of the amendments derive much of their force from this latter provision. It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation." (Italics in original.) Ex parte Virginia, 100 U. S. 339, 345, 25 L. ed. 676, 679.

"It is significant that this Court never has interfered with the composition of state court juries except in cases where this guidance of Congress was applicable."

"These defendants rely heavily on arguments drawn from our decisions in Glasser v. United States, 315 U. S. 60, 86 L. ed. 680, 62 S. Ct. 457; Thiel v. Southern P. Co., 328 U. S. 217, 90 L. ed. 1181, 66 S. Ct. 984, 166 A. L. R. 1412, and Ballard v. United States, 329 U. S. 187, ante, 181, 67 S. Ct. 261. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts.

Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process."

"A verdict on the evidence, however, is all an accused can claim; he is not entitled to a setup that will give a chance of escape after he is properly proven guilty. Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury."

"Until recently, and for nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries. The first state to permit women jurors was Washington, and it did not do so until 1911. In 1942, only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve, they might claim exemption because of their sex. It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the constitution, it is based on a changing view of the rights and responsibilities of women in our public life."

"We may insist on their inclusion on federal juries where by state law they are eligible but women jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if this state has lagged behind what we personally may regard

as the most desirable practice in recognizing the rights and obligation of womanhood."

"As there is no violation of a federal statute, alleged, the challenge to this judgment under the due process clause must stand or fall on a showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law. On this record we think that showing has not been made.

Affirmed."

Petitioner would contend that the case of Fay v. New York is not applicable to the instant facts, but his reasons for so contending are not apparent. Both the court below and respondents, if we read the case correctly, could not escape the conclusion that Fay v. New York represented the opinion of The Supreme Court on the particular facts of the case involved in this petition. In April, 1949, the Arkansas Supreme Court reached a similar conclusion on similar facts. (*Bailey v. State*, supra.)

Petitioner having wholly failed to show that he has had a trial so unfair as to amount to a taking of his liberty without due process of law or in denial of equal protection of law, there is nothing whatever in this record to warrant review by The Supreme Court on certiorari.

II.

There is No Conflict of Decision.

It is obvious that there is no conflict of decision presented to this court. There could be none on this record. There is no conflict between decisions cited by petitioner and those relied upon by the court below and respondent. The decision in this case in the court below presents no conflict of decision.

III.

No Important Question of Federal Law is Presented.

Petitioner was found guilty of murder by a jury selected according to law and statutory mandates. While women were not represented upon the jury panel or petit juries, their absence is accounted for by lack of adequate facilities to accommodate women jurors.

Petitioner has not shown that the absence of women was due to discrimination, nor that their absence in any manner prejudiced him.

Resorting to the familiar argument of "This decision-is-correct-but-see-where-it-might-lead," petitioner, as we have pointed out, even endeavors to inject a racial aspect into a simple criminal case by contending, in Kansas where racial segregation is unknown, that conceding a proper absence of women where facilities are wholly inadequate would require racial discrimination on juries.

The listing of unrelated, invalid analogies does not make an important Federal question.

The decision below turns on its own facts, as has been already demonstrated. It affects none except the litigants. A special, emergency situation was involved, which may never again arise.

The decision below was correct on the facts, and the employment of splendid sounding phonetics does not convert a correct decision in a simple case into an important question of Federal law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

I.

KANSAS CONSTITUTION.

The following provision of the Kansas Constitution is material to a consideration of this petition:

> "Sec. 10. Trial; defense of accused. In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense."

II.

KANSAS STATUTES.

The following Kansas statutes are in our opinion all of the Kansas jury statutes material to a consideration of this petition:

> "43-101. *Listing persons for jury service.* The trustee of each organized township, and the mayor of any city not included in any corporate limits of any township, shall at his office during the month of April of each year make a list of persons to serve as jurors for the ensuing year, as hereinafter provided."
>
> (G. S. 1935)

> "43-102. *Selection; qualifications; number to be selected.* They shall select from those assessed on the assessment roll of the preceding year suitable persons having the qualifications of electors, and in

making such selection they shall choose only those who are not exempt from serving on juries, and who are possessed of fair character and approved integrity, and in possession of their natural faculties, and not infirm or decrepit, and who are well informed and free from legal exceptions: Provided, that no person shall be selected as a juror who either in person or by any other means shall solicit his selection as such; and the trustee of each township and the mayor of each city shall each select at least one such person for each fifty inhabitants therein."

(G. S. 1935)

"43-103. *Jurors of preceding year not selected; challenge for cause by reason of; lists certified by county clerk.* In making such selections, each person who shall have served as a juror in any capacity at any term of court during the year next preceding such selection shall be excluded from the list of jurors for the then ensuing year; and if any such person shall be selected or drawn, it shall be the duty of the court to which such jurors shall be summoned to strike the names of such persons from the list of jurors; and it shall be good cause of challenge to any juror that such juror shall have served as a juror in any court of record during the year next preceding such selection; and no juror called or summoned, who shall have so served during such preceding year, shall draw any pay for more than one day during the term of court to which he shall be so summoned; and a list of the persons so selected shall be, immediately after such selection, certified by the officers making such selection to the county clerk of such county."

(G. S. 1935)

"43-104. *County clerk to file such lists; names to be prepared and placed in 'jury box'.* On receiving such lists the county clerk shall file the same in

his office, and shall write down the names contained therein on separate pieces of paper, of the same size and appearance, as nearly as may be, and shall fold up each of such pieces of paper so as to conceal the name thereon, and deposit them in a box to be kept by him for that purpose, to be labeled 'jury box'."

(G. S. 1935)

"43-105. *Persons so selected to serve one year.* The persons whose names shall be so returned shall serve as such jurors for one year, and until other persons are selected and lists of such persons returned and filed."

(G. S. 1935)

"43-106. *Papers in jury box to be destroyed and new names entered on receipt of new lists.* Upon the receipt of such certificates of selection of jurors such county clerk shall destroy the papers in the jury box containing the names of jurors heretofore selected, and file such new lists and place in the jury box the names of the jurors so drawn, as provided in section six (46-123) of this act."

(G. S. 1935)

"43-107. *Drawing of grand and petit jurors.* At least thirty days before any term of the court at which a petit jury shall be required by law, or a grand jury ordered by the court, the clerk of the county where such court is to be held shall draw from the jury box the names of fifteen persons to serve as grand jurors and the names of twenty-four persons to serve as petit jurors."

(G. S. Suppl. 1947)

"43-108. *Notice to sheriff and clerk of the district court of drawing of jurors.* At least three days before the drawing of such jurors the clerk shall give notice to the sheriff, the clerk of the dis-

trict court and the register of deeds of the day and hour when such drawing will take place."

(G. S. Suppl. 1947)

"43-109. *Witness of drawing by officers.* At the time so appointed, it shall be the duty of the sheriff of the county, in person or by his undersheriff, and the clerk of the district court, and the register of deeds to attend at the county clerk's office to witness such drawing, and if any two of said officers shall attend at the time and place appointed, the clerk shall proceed, in their presence, to draw the jurors."

(G. S. Suppl. 1947)

"43-110. *Clerk to adjourn drawing if officers do not appear.* If two of the officers so notified do not appear, the clerk shall adjourn the drawing of such jurors until the next day."

(G. S. Suppl. 1947)

"43-111. *Clerk to draw jurors on adjourned day if officers appear.* If at the adjourned day any two of the officers notified to attend the drawing of such jurors shall appear, but not otherwise, the clerk shall proceed, in the presence of the officers so appearing, to draw the jurors.

(G. S. 1935)

"43-116. *Exemption from jury service.* The following persons shall be exempt from serving as jurors, to wit: All persons holding office under the laws of the United States or this state, attorneys and counselors at law, women, physicians, all registered pharmacists and assistant pharmacists, ministers of the gospel, professors and teachers of colleges and other institutions of learning, ferrymen, all members of any company of firemen organized according to law, all persons more than sixty-five years of age: Provided, however, That this act

shall not exempt from jury service township officers and officers of district schools."

(G. S. 1935)

"43-117. *Same; women exempt, when.* That it shall be the duty of each township and city assessor, at the time of making the annual assessment of personal property, to inquire of each woman elector within his township or assessing district, whether she desires to be exempt from jury service for the ensuing year, and if she answers that she does desire to be so exempted from such jury service, her name shall not thereafter be placed in the list of persons to serve as jurors, nor otherwise selected for such purpose, but if she answers that she does not desire to be so exempted her name shall be reported by the assessor in making his regular report and the names of such suitable persons not wishing such exemption shall be placed in the lists as other qualified jurors are placed."

(G. S. 1935)

"43-120. *Order for additional number of jurors.* That whenever in the opinion of the judge of any district court, more than twenty-four petit jurors shall be necessary to attend any such district court, he may, by an order under his hand, direct such additional number of jurors to be drawn as he may deem necessary."

(G. S. Suppl. 1947)

"43-121. *Same; filing of order and drawing of jurors.* Such order shall be served on and filed with the clerk of the county in which such court is to be held, at least thirty days previous to the day appointed for the commencement thereof, and the said clerk shall thereupon draw the number specified in such order in addition to the number otherwise required by law, and shall proceed therein in all respects in the same manner herein prescribed."

(G. S. 1935)

"43-122. *Immediate drawing and summoning where jurors not summoned or sufficient number not in attendance.* Whenever for any cause petit jurors shall not have been drawn and summoned to attend any court of record, or a sufficient number of qualified jurors shall not be in attendance at such court, the court shall order a sufficient number to be immediately drawn and summoned as herein provided."

(G. S. 1935)

"43-128. *Court to select jurors and cause venire to issue where officers have failed to perform duty.* That whenever it shall be made to appear to the court that the township trustees and mayors of cities, as provided for in the act to which this is an amendment, have failed to make the lists from the assessment rolls of the previous year, or that from any other cause the lists furnished by them to the county clerk or the names taken therefrom and deposited in the jury box have been so returned or deposited as to vitiate a panel drawn therefrom, it shall be the duty of the judge of such court to forthwith select a sufficient number of jurors for the term, and cause a venire to issue for the same, naming the jurors so selected therein."

(G. S. 1935)

"43-129. *Order for new list when lists irregular.* That whenever it shall be made to appear to the court that from any cause the lists made out by the township trustees and mayors of cities and deposited with the county clerk, and the names taken therefrom and deposited in the jury box, have been so made out and returned or so deposited as to vitiate the panel, it shall be the duty of the judge of such court to issue his order to said trustees and mayors of cities to meet at the office of the county clerk on a day in said order named, and then and there to make out a list of persons to

serve as jurors for the balance of the ensuing year, as in said act to which this is an amendment provided."

(G. S. 1935)

"43-130. *Same; duty of clerk.* That upon the completion and certification of said lists by said township trustees and mayors of cities, they shall be delivered to the county clerk, who shall file the same in his office and proceed to write down the names contained in such lists in the same manner as though such lists had been certified to and deposited with him at the time fixed by law."

(G. S. 1935)

III.

KANSAS DECISIONS.

The following extracts from the Kansas decisions construe and apply certain of the foregoing statutory directives and are submitted accordingly.

In *State v. Schmidt,* 74 Kan. 627, it is said:

"Where it is made to appear to the court that the township trustees and mayors of cities have failed to make lists of persons to serve as jurors, or where the lists furnished by them to the county clerk or the names taken from the lists and deposited in the jury-box have been so returned or deposited as to vitiate the panel, the duty devolves upon the district judge to select a sufficient number of jurors for the term. (Syl. 1, p. 627) ***

"The defendants were tried at the November, 1905, term of the court. In the early part of that term there was a challenge to the array of regular jurors in attendance for the term, and the court upon consideration of the challenge determined that the lists of jurors furnished by the township trus-

tees and mayors of the cities of the county, and the names taken from the lists and deposited in the jury-box, had been so returned and deposited as to vitiate any and all panels drawn from that box. The court, having determined that there was no legal panel of jurors, found that the attendance of jurors for the term was necessary for the transaction of the business of the court, and, upon an order of the court, the judge selected thirty-seven qualified jurors to serve as regular jurors for the November term of the court. Later in the term, and when jurors so selected were called for the trial of defendants, the latter interposed a challenge to the validity of the paned, which was overruled, and they now complain because the court refused them a trial by a jury drawn from the jury box. (p. 628) ***

"The cited case of *The State v. Edwards,* 64 Kan. 455, 67 Pac. 834, related to the filling out of an existing panel and has no application to a situation where the court finds that the steps taken in placing names in a jury-box are such as entirely to vitiate the panel. (p. 629) ***

"It does not appear that a fair jury was not obtained, *** " (p. 630)

In *State v. Allen,* 98 Kan. 778:

"Where in a criminal prosecution the court sustains the defendant's challenge to the array and discharges the panel because the original names in the jury box have not been properly selected from the assessment rolls, it is the duty of the judge, under section 4624 of the General Statutes of 1909, to select a sufficient number of jurors for the term and to name those selected, and it is not error to refuse to summon the township trustees and require them to select the lists of jurors. (The State v. Schmidt, 74 Kan. 627, 87 Pac. 742.) (p. 779, Syl. 3) ***

"There is a complaint that the jury was not selected according to law. The court sustained the defendant's challenge to the array, and discharged the panel because the original names in the jury box had not been selected from the assessment rolls of the previous year. Thereupon the judge proceeded to select a jury for the term, following the provisions of section 4624 of the General Statutes of 1909, which requires the judge to select a sufficient number of jurors for the term and to name those selected, whenever for any cause the lists have been improperly returned. It is contended that the township trustees should have been summoned and required to select the lists of jurors. Aside from the fact that such a method would have been cumbersome and the cause of unnecessary delay, the procedure which the court followed is authorized by the section of the statute just cited. It was so decided in the case of *The State v. Schmidt,* 74 Kan. 627, 87 Pac. 742. In the opinion in that case the distinction between the situation here and that involved in *The State v. Edwards,* 64 Kan. 455, 67 Pac. 834, cited in support of defendant's contention, was pointed out. Moreover, there is nothing to indicate that defendant suffered any prjeudice by the manner in which the jurors were selected." (pp. 785, 786)

Note: Section 4624, G. S. 1909, is now G. S. 1935, Section 43-128.